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No. 77-780

In the Supreme Court of the United States

OCTOBER TERM, 1977

BERNARD CORNFELD, D/B/A GRAYHALL, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1977. The petition for a writ of certiorari was filed on November 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the obtaining of evidence of petitioner's wire fraud by a telephone company employee was reasonable and necessary to protect the company's property within the meaning of 18 U.S.C. 2511 (2)(a)(i).

2. Whether 18 U.S.C. 2511(2)(a)(i) authorizes telephone company employees to intercept and disclose communications to law enforcement authorities when such interception and disclosure is reasonable and necessary to protect the company's property from fraud.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Central District of California of wire fraud in violation of 18 U.S.C. 1343. He was fined $1,000 and sentenced to two years' imprisonment, with all but three months of the sentence suspended. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner instructed his employees to place numerous long distance telephone calls knowing the calls would be placed with an electronic device, known as a "blue box," that enabled the caller to place calls and avoid the tolls. After reviewing a routine "800 INWATS" printout[1] a Pacific Telephone Company investigator became suspicious of the number of area code 800 calls made from petitioner's telephone (Tr. 200, 208-209). Following standard procedure for documentation in potential blue box cases, the company conducted a further study of petitioner's telephone number, which disclosed that from November to December 1974, 27 area code 800 calls were placed from petitioner's number (Tr. 200-201, 206).

Continuing to act in accordance with company policy, the investigator attached a CMC 2600 device[2] to

[1]An 800 INWATS printout shows all area code 800 calls that last longer than three minutes. The printout showed that a number of such calls were made from petitioner's telephone (Tr. 200).

[2]A CMC 2600 device registers the number of times a 2600 cycle tone is sent across the line to which it is attached. A 2600 cycle tone is emitted by a blue box (Pet. App. 3a-4a).

petitioner's telephone line (Tr. 209-211). A tape recorder was attached to the CMC 2600; it was activated ~~automatically when the CMC 2600 cycle activity, and~~ automatically when the CMC 2600 registered 2600 cycle activity, and automatically stopped recording after two minutes (Tr. 212). The company investigator then replaced the CMC 2600 with a more sophisticated toll fraud detector which produced, in black letters, a print-out of all long distance telephone numbers called from petitioner's telephone and, in red letters, the long distance telephone numbers called with the use of a blue box (Tr. 212, 213). This toll fraud detector was attached to petitioner's telephone line for 20 days (Tr. 214). Pacific Telephone Company investigators estimated that a blue box was used in making hundreds of long distance telephone calls from petitioner's telephones (Tr. 283-284, 314-316).

In January 1975 the company informed the FBI of its investigation. After obtaining a search warrant, FBI agents searched petitioner's house and found two blue boxes (Tr. 357-359). In addition, several of petitioner's employees testified that he instructed them to use a blue box when placing long distance telephone calls (Tr. 412-414, 430-432, 513-528, 589-592).

ARGUMENT

1. Petitioner contends (Pet. 7-10) that the telephone company's actions in obtaining the evidence of his fraud went beyond its authority in 18 U.S.C. 2511 (2)(a)(i), which permits an employee of a communications carrier to intercept and disclose communications "while engaged in any activity which is a necessary incident * * * to the protection of the rights or property of the carrier * * *." Petitioner appears to argue (Pet. 7-8) that the tape recording of certain calls was unnecessary because the Company already had adequate evidence of his fraud.

Petitioner's argument is groundless. The procedures followed by Pacific Telephone were reasonable and fully complied with Section 2511(2)(a)(i). Only fraudulent calls were recorded and the recordings were limited to the initial two minutes, long enough to identify the parties to the fraudulent call. All of the monitoring devices were installed for only three weeks, long enough to insure that the evidence obtained would sustain a successful prosecution.[3] Those measures were reasonable and constituted a necessary incident to the protection of the company's property. See *United States* v. *Goldstein*, 532 F. 2d 1305 (C.A. 9), certiorari denied *sub nom. Roberts* v. *United States*, 429 U.S. 960; *United States* v. *Clegg*, 509 F. 2d 605 (C.A. 5).

Nor is there merit to petitioner's claim (Pet. 8-9) that there is a conflict within the Ninth Circuit on the question of what interceptions are justified as necessary to protect the telephone company's property.[4] Both *Goldstein*, *supra*, and *Bubis* v. *United States*, 384 F. 2d 643 (C.A. 9) (cited by petitioner for the alleged conflict), agree that the question is whether the interceptions were reasonable and necessary—a question which turns on the facts of each case. *Bubis*, which held the conduct to be unreasonable,

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[3]Contrary to petitioner's apparent assertion (Pet. 7-8), evidence of blue box use alone is not sufficient to insure a successful prosecution. Completion of a call must be shown both in a prosecution for wire fraud and to entitle the company to charge the caller for the use of its long distance service. Verification that the calls were completed is absolutely necessary in order to make a case against petitioner. Since a telephone company does not bill for dialing, but only for completed calls, it had to show that it was fraudulently deprived of monies due it, that its billing procedures were bypassed, and that the completed calls were made.

[4]Even if there were such an intracircuit conflict, it would not merit this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901.

involved the recording of every call made and received for three months and is thus clearly distinguishable from *Goldstein* and the instant case.

2. Petitioner also claims (Pet. 10-13) that Section 2511(2)(a)(i) does not authorize telephone companies to disclose intercepted communications, and that such disclosure is prohibited by 47 U.S.C. 605. That claim has been consistently rejected by the courts of appeals and is without merit.

Prior to 1968, Section 605 generally prohibited the disclosure of wire communications by telephone company employees, with certain exceptions. See 47 U.S.C. (1964 ed.) 605.[5] In 1968, in connection with the passage of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as added, 18 U.S.C. 2510 *et seq.*, Section 605 was amended by adding the following qualification at the outset: "Except as authorized by chapter 119, Title 18 [18 U.S.C. 2510 *et seq.*] * * *."The relevant corresponding provision of chapter 119 is 18 U.S.C. 2511(2)(a)(i), which provides:

> It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, that said com-

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[5]Even under the former Section 605, the courts had generally held that a telephone company could monitor and disclose telecommunications on its lines to the extent necessary to protect it from fraud. *United States* v. *Bubis*, *supra*; *Sugden* v. *United States*, 226 F. 2d 281 (C.A. 9), affirmed, 351 U.S. 916; *United States* v. *Gallo*, 123 F. 2d 229 (C.A. 2).

munication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

The 1968 enactment of 18 U.S.C. 2511(2)(a)(i) and the corresponding amendment of Section 605 clearly indicate that Congress intended to authorize communications carriers to conduct reasonable interceptions to prevent subscriber fraud and to disclose those interceptions to appropriate law enforcement authorities. See *United States* v. *Goldstein, supra; United States* v. *Clegg, supra; United States* v. *Auler*, 539 F. 2d 642 (C.A. 7), certiorari denied, 429 U.S. 1104; *United States* v. *Freeman*, 524 F. 2d 337 (C.A. 7), certiorari denied, 424 U.S. 920.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.

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[6]Petitioner's reliance (Pet. 12-13) on a statement in Mr. Justice Fortas' dissenting opinion from the denial of certiorari in *Hanna* v. *United States*, 394 U.S. 1015, is misplaced. That case dealt with 47 U.S.C. 605 before its amendment. Mr. Justice Fortas' remark in a footnote (394 U.S. at 1017 n. 2) that it was not clear whether the newly enacted Section 2511(2)(a) would "authorize this kind of conduct if a similar case occurred today" pertained to the conduct in that case; it did not suggest that Section 2511(2)(a) provides no authority for reasonable interceptions by telephone company employees.